

82-1151

Supreme Court, U.S.  
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In The  
**Supreme Court of the United States**

October Term, 1982

No.

LEATHERSMITH OF LONDON, LTD.,  
A New York Corporation,

*Petitioner,*

vs.

PHILIP J. S. ALLEYN, etc.,

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

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December 23, 1982

Questions Presented

1. Are there any Due Process standards involved in declaring a valid trademark has become generic, or may it be on whim?

2. May a valid registered trademark be declared generic (and thereby destroying a business; ignoring this recession) without first requiring substantial and proper evidence of such alleged change?

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1982

No. \_\_\_\_\_

Leathersmith of London, Ltd., a  
New York Corporation

Petitioner

vs.

Philip J. S. Alleyn, Etc.,

Respondent

PETITION FOR WRIT OF  
CERTIORARI TO THE COURT  
OF APPEALS FOR THE FIRST  
CIRCUIT

Petitioner prays that a  
Writ of Certiorari be issued to  
review the judgment of the Court  
of Appeals for the First Circuit.  
This was entered on December 14,  
1982.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit has not yet been reported, but is set forth in the Appendix, infra at page 1a.

The opinion of the District Court for the District of Massachusetts, which was affirmed, is set forth in the Appendix, infra at page 17a.

JURISDICTION

The determination of the Court of Appeals was made December 14, 1982. 28 USC §1254 is the authority.

Petitioner asks for the issuance of a writ of certiorari as petitioner did not receive Due



Process pursuant to Amendments V and XIV of the United States Constitution (Appendix, pages 29a-30a).

Petitioner avers the court, in taking petitioner's multi-registered trademark, just plain ignored proper English word use and etymology, ignored the validity of petitioner's trademarks as many times passed upon by the Commissioner of Trademarks and Patents, and finally, the court declared without proof, without evidence, that petitioner's trademark was a generic word. This was done under the guise of allowing "fair use" of petitioner's property, its trademark; thereby destroying a business.

That is hardly Due Process respectfully.

STATEMENT OF THE CASE

Petitioner is a subsidiary of the trademark registrant of the mark LEATHERSMITH. By an undisputed licensing agreement it enforces the trademark rights of the trademark registrant in the United States.

Defendant seized upon the trademark LEATHERSMITH and used it in his trade name, and no other use. Petitioner did object, brought suit, lost in the United States District Court on an improper survey (Appendix p.17a). In the Circuit Court, it ignored that survey (probably because it was so flagrantly improper), but

nevertheless affirmed that LEATHER-SMITH was generic. This was contrary to proper English word use. This is shown indeed by that court's own words where it stated that defendant "is a skilled leather craftsman and book binder." It did not write "is a skilled leathersmith and . . . " because such would have been erroneous. Appendix, p.19a.

REASONS FOR GRANTING THE WRIT

Petitioner avers that if the English language has meaning, its proper use is to be followed, and not arbitrarily enlarged without proof of changing a trademark into a generic word.

Petitioner also avers that where the very issue of whether or not a word is generic has been

before the Commissioner of Trade-  
marks and Patents and found not  
generic, any Court should not  
capriciously disregard that and  
say the trademark is generic  
merely because it sounds like it  
could be.

Petitioner avers that  
to destroy a trademark can be,  
and does mean, a business is  
destroyed. This should not be  
done without sizeable proof.

Lacking the foregoing  
means Due Process is ignored in  
fact. This is particularly so  
when the court's determination  
is not after a trial, but is  
after considering papers on a

motion for summary judgment.

Akin to this matter is the "Leatherwright" trademark Petitioner just coined for the litigation. No question one can 'guess' it refers to a maker of leather items. That does not make it descriptive, generic; no more than "Leathersmith" is descriptive or generic without proof that it has become other than a trademark. But the court in Boston "felt" apparently it had; that is hardly Due Process respectfully.

If "Leathersmith" is to join aspirin and cellophane (former trademarks) as generic words, it should be only after hard and fast proof --that would be Due Process.

ARGUMENT

The trademark

LEATHERSMITH is what is termed "incontestable." In essence, that means it has stood a certain test of time and should be given due respect of its status. Lanham Act Sec. 15, 15 U.S.C. 1065.

There is no question that LEATHERSMITH conveys the meaning of a person working in leather. If dealing with "the common use of language" (Application of Automatic Radio Mfg. Co., 404 F.2d 1391, 1395 (CCPA 1969)) then the meaning of "-smith" should be considered. 9 Oxford English Dictionary, part I, p. 278 notes its prime meaning is "One who works in iron or other

metals." While the Court of Appeals noted words such as "tune smith" were in the dictionary (Appendix, page 13a) it avoided saying "Leathersmith" was --as it clearly and absolutely is not.

All "trademarks are presumed to be valid." Donald F. Duncan, Inc. v. Royal Tops Mfg. Co. Inc., 343 F.2d 655, 660 (7th Cir. 1965); the Lanham [trademark] Act Sec. 7(b), 15 U.S.C. 1057(b). The fact of registration means "a presumption of validity, which is entitled to considerable weight." [Citing] Miss Universe, Inc. v. Patricelli, 408 F.2d 506, 509 (2d Cir. 1969). Union Carbide Corp. v. Ever-Ready Inc., 392 F.Supp. 280,

285 (ND Ill. 1975). The "dictionary definitions are releavant and often persuasive in determining public usage." Surgicenters of America, Inc. v. Medical Dental Surgeries Co., 601 F.2d 1011 (9th Cir. 1979); S. S. Kresge Co. v. United Factory Outlet, Inc., 598 F.2d 694, 696 (1st Cir. 1979). Apparently this time the Court of Appeals chose to ignore that; but the District Court noted "Leathersmith" was not in the dictionary. (Appendix p. 17a at 28a).

The above is properly coupled with the fact that "The effect of registration under the Lanham Act . . . " would require the defendant to show, to prove, that the mark LEATHERSMITH has become generic, which the Court at no time alleged he did. Keebler Co.



v. Rovira Biscuit Corp., 624 F.2d 366,  
374 (1st Cir. 1980)

For the court below to have said the parties were not competing (which was not so on the facts, but so be it) "is never a complete answer". President & Trustees of Colby College v. Colby College-New Hampshire, 508 F.2d 804 (1st Cir. 1975). To aver that no confusion was shown is to drag a red herring across the path.

There is little doubt that one of the prime features of the 1946 Lanham [trademark] Act was the creation of a conclusive presumption of trademark rights in seasoned registrations. 92 Cong.Reg. 7524

quoted 2 McCarthy, Trademarks & Unfair Competition §32.44, p. 495.

The fact that the Trademark & Patent Office was willing to register

(not once but several times) the trademark LEATHERSMITH on the Principal Register "creates a strong presumption of the validity of the mark." American Home Products v. Johnson Chemical Co. 589 F.2d 103 (2nd Cir. 1978). That court had quoted (at 106) from Aluminum Fabricating Co. v. Pittsburg, 259 F.2d 314, 316 (2nd Cir. 1958)

[W]here it can be argued with equal force that a mark is descriptive and on the contrary that it is arbitrary and fanciful, the courts should not overrule the action of the Patent Office to whose care Congress has entrusted the preliminary determination as to whether a mark fulfills the requirements of the statute.

But the Court did ignore just that. To do that, without proof, without dictionary support, without evidence of generic-descriptiveness, is arbitrary, it is destructive of Petitioner's business, and is hardly a Due Process adherence.

The innocence of the respondent in using LEATHERSMITH is absolutely and completely irrelevant. The Act says registration is constructive notice. Lanham Act Sec. 22, 15 U.S.C. 1072; In re Beatrice Foods Co., 429 F.2d 466, 472-473 (CCPA 1970); Weinstein, Trademark Selection, 85 Case & Comment 30, 30 (July-August 1980).

It does not matter one iota if not a single person would think

respondent's business was or was not connected with that of petitioner. Petitioner has a valid, presumed, conclusively presumed valid trademark and no one has a right to use it. This whether or not the goods are identical (some were contrary to the court's statement), and whether or not marketed in the same channels (which they were) but Petitioner need not so show (contrary to the court) using the self-same cited case, President & Trustees of Colby College, op. cit., supra, p. 11), accord, Dallas Cowboys, etc. v. Pussycat Cinema, Ltd. 607 F.2d 200, 206, 207 (2nd Cir. 1979).

CONCLUSION

Due Process does require correct and full procedures. Petitioner avers such was lacking; the Court ignoring the conclusive presumption of trademark validity (at variance with other Circuits and even its own prior rulings); the proper English use of "-smith" (not merely the fact it sounds like it could be an English word, and using exceptions as proof of its self-declared rule); and generally going to a determination without proof of the propriety thereof, thereby destroying a business.

Therefore, Petitioner

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asks that its Writ of Certiorari  
be granted.

December 23, 1982

Respectfully submitted,

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